MOTION FILED
DEC 1 1986

IN THE SUPREME COURT OF THE UNITED STATES

Case No. 86-806

LAWRENCE E. JOSEPH AND R. FRANK JOSEPH,

Respondents,

v

L. BROOKS PATTERSON, RICHARD THOMPSON, DAVID CASE, individually and in their capacities as Oakland County Prosecutors; JAMES A'HEARN and ROBERT LEON, individually and in their capacities as members of the Oakland County Prosecutor Office Investigation Division and/or of the Oakland County Organized Crime Strike Force; Jointly and Severally,

Petitioners.

# MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE ON BEHALF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN

# BRIEF OF AMICUS CURIAE

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**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE ON BEHALF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN**

NOW COMES The Prosecuting Attorneys Association of Michigan through John D. O'Hair, Prosecuting Attorney for the County of Wayne; Timothy A. Baughman, Chief of the Criminal Division, Research, Training and Appeals and Don W. Atkins, Assistant Prosecuting Attorney and makes this motion for leave to file brief as

amicus curiae, pursuant to Rule 36, stating in support thereof the following:

1. The Prosecuting Attorneys Association of Michigan is a special purpose organization which represents the interests and concerns of all county prosecuting attorneys in the State of Michigan with respect to the development of the criminal law.

2. The Prosecuting Attorneys Association of Michigan supports the position of the Petitioners in this cause. This Association sought written consent of the parties to file a brief as amicus curiae in this cause. While counsel for the Petitioners, Ms. Janice G. Hildenbrand, was and remains willing to consent to this request, your movant was informed on December 8, 1986 that counsel for the Respondents, Mr. Hugh M. Davis, Jr., has refused to consent to

this Association's request to file a brief as amicus curiae (See attached affidavit of Janice G. Hildenbrand).

3. The issues raised by the petition for a writ of certiorari in this matter are of paramount interest to all members of the Association since they touch upon the basic and fundamental duties of the office of prosecuting attorney as well as their ability to enforce the criminal laws of the State.

4. In Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), this Court held only that a prosecutor is immune from a civil suit for damages under 42 U.S.C. 1983 in "initiating a prosecution and in presenting the State's case". "Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence.

At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them ." 424 U.S. at 431 n. 33, 96 S.Ct. at 995 n. 33, 47 L.Ed.2d at 144 n. 33. In the ten years since Imbler, this Court has not addressed the issue which is presented in the instant petition; namely, to what extent is a prosecutor immune from suit for actions which are taken prior to the filing of criminal charges?

5. Your movant believes that the accompanying proposed brief as amicus curiae sets forth in greater detail the reasons which support the contention that state prosecuting attorneys are entitled to the cloak of absolute immunity when

they are discharging the duties which they are required to undertake in determining whether to bring criminal charges.

6. The ability to conduct interviews of witnesses prior to decision of whether to initiate a criminal prosecution and the opportunity to assist police agencies in the drafting and preparation of search warrants prior to the initiation of criminal proceedings must not be hampered by the cloud of potential civil liability. Such activities are an integral part of the process of "initiating a prosecution". To deny such protection will only inhibit the fair and effective enforcement of the criminal laws and "foster uninformed decision-making".

7. The authorities relied upon by your movant clearly support this

proposition and reveal that a vast number of state and federal courts which have considered this issue subsequent to Imbler have either adopted or urged the adoption of a rule of absolute immunity for the type of pre-charging activities which have occurred in the instant matter.

8. Your movant believes that the accompanying brief will be of substantial benefit to this Court in its determination of whether to grant the Petition for a Writ of Certiorari which your movant urges this Court to do.

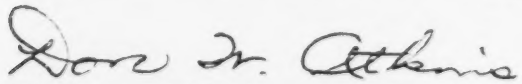
## RELIEF

WHEREFORE, The Prosecuting Attorneys Association of Michigan, as Amicus Curiae, requests this Honorable Court to grant this motion for leave to file brief as Amicus Curiae in support of the Petition for a Writ of Certiorari filed by the Petitioners in this matter.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of the Criminal Division
Research, Training and Appeals



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## INTEREST OF THE AMICUS CURIAE

The Prosecuting Attorneys Association of Michigan is a special purpose organization which represents the interests and concerns of all county prosecuting attorneys in the State of Michigan with respect to the development of the criminal law. The issues raised by the petition for a writ of certiorari in this matter are of paramount interest to all members of the Association since they touch upon the basic and fundamental duties of the office of prosecuting attorney as well as their ability to enforce the criminal laws of the State. It is, therefore, respectfully urged that the petition be granted.

## ARGUMENT

A STATE PROSECUTING ATTORNEY IS ENTITLED TO ABSOLUTE IMMUNITY FROM CLAIMS ARISING UNDER 42 U.S.C. 1983 WHERE ALL ACTIONS TAKEN BY HIM WERE WITHIN THE AUTHORITY AND DUTIES OF HIS OFFICE AND WERE INTIMATELY RELATED TO AND INSEPARABLE FROM THE DECISION TO INITIATE A CRIMINAL PROSECUTION.

Both federal and state courts have held repeatedly that a prosecuting attorney is cloaked with absolute or "quasi-judicial" immunity for any and all acts performed within the scope of his authority and jurisdiction.

In Thompson v. Heither, 235 F.2d 176 (6th Cir. 1956), the plaintiff brought a civil rights action alleging false arrest, malicious prosecution and

conspiracy in bringing about his arrest and prosecution against a number of police officers, a Recorder's Court Judge, the Wayne County Prosecuting Attorney and his chief assistant. In sustaining the lower court's dismissal of the action, the Sixth Circuit Court of Appeals made the following pertinent observation (235 F.2d at 177):

> "...[J]udges and prosecutors, in cases where there is jurisdiction over the persons of defendants and over the offenses for which they are tried, come within the doctrine of judicial immunity by an important series of cases in the Supreme Court of the United States and other courts."

In Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), the court summarized the reasons which required that a prosecuting

attorney be granted the same immunity as is afforded members of the judiciary (361 F.2d at 590):

> "...[H]is primary responsibility is essentially judicial - the prosecution of the guilty and the protection of the innocent, Griffin v United States, 295 F 437, 439-440 (CA 3, 1924); his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench. This reasoning is nearly as well established in Anglo-American law as judicial immunity itself." (Footnote omitted).

This recognition of the prosecuting

attorney's status has not been overlooked by this Court. Quite to the contrary, it has re-affirmed the proposition. In Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), the plaintiff had been convicted of murder and later succeeded in obtaining his release from state prison through federal habeas corpus proceedings. Thereafter, he brought an action under 42 U.S.C. 1983 against the prosecutors and others involved in the prosecution that led to his conviction. The plaintiff alleged that the prosecutor had knowingly used false testimony and suppressed material evidence at his trial.

The majority opinion in Imbler addressed the underlying policy considerations for absolute prosecutorial immunity from civil liability at common law to buttress the conclusion that a prosecutor enjoys the same absolute immunity in actions

brought against them under 42 U.S.C. 1983 (424 U.S. at 422-424, 96 S.Ct. at 991-992, 47 L.Ed.2d at 139-140):

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust. One court expressed both considerations as follows:
>
> > The office of public prosecutor is one which must be administered with courage and indepen-

dence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction.

There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case ... The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which

> should characterize the administration of this office. The work of the prosecutor would thus be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement." Pearson v Reed, 6 Cal App 2d 277, 287, 44 P2d 592, 597 (1935).

In accordance with its decision in Imbler, this Court in Williams v. Hilliard, 424 U.S. 961, 96 S.Ct. 1453, 47 L.Ed.2d 729 (1976) vacated the decision of the Court of Appeals in 516 F.2d 1344 (6th Cir. 1975) which had held that a state prosecutor was liable for civil damages when his actions and omissions deprived a former state defendant of her constitutional rights to a fair trial. On remand [540 F.2d 220 (6th Cir. 1976)], the Court of Appeals adhered to the

principle that a state prosecutor is absolutely immune for acts and/or ommissions within the scope of his duties even where the prosecutor knowingly uses perjured testimony, deliberately withholds exculpatory information or fails to make disclosure of all facts which may cast doubt upon the testimony elicited in the state's case.

This rule of absolute immunity is no different in Michigan. In Belt v. Ritter, 385 Mich. 402, 189 N.W.2d 221 (1971), the Michigan Supreme Court recognized that the immunity of the judiciary had been extended to prosecuting attorneys on the theory that they act in a quasi-judicial capacity. In Bloss v. Williams, 15 Mich.App. 228, 166 N.W.2d 520 (1968), the court noted that the prosecuting attorney's status as a quasi-judicial officer has existed at least since 1883, citing the case of

People v. Bemis, 51 Mich.422 (1883).

In finding that a prosecutor is absolutely immune from claims of defamation for statements made during the course of his prosecutorial duties, the Michigan Court of Appeals in Payton v. Wayne County, 137 Mich.App. 361, 357 N.W.2d 700 (1984) re-affirmed the rule of absolute immunity and cited with approval the case of Davis v. Eddie, 130 Mich.App. 284, 343 N.W.2d 11 (1983) (137 Mich.App. at 370- 371):

> While Davis involved a claim of false arrest and imprisonment rather than defamation as a result of a press release, this Court stated that "[w]here a prosecutor's actions are within the scope of his prosecutorial functions and duties, his acts are quasi-judicial in nature and he has absolute immunity

regarding the performance of those functions and duties". Davis, p 286. In reaching this conclusion, the Davis Court relied upon the following observation from Bloss v Williams, 15 Mich App 228; 166 NW2d 520 (1968):

> "'The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions ***.' Citing Yaselli v Goff, 12 F2d 396, 406 (CA 2, 1926)." Davis, supra, pp 286-287.

The Davis Court also noted that the duties and functions of a prose-

cutor are not strictly or narrowly construed, again citing the following passage from Bloss:

> "'The prosecutor's powers and duties include not only those expressly set forth in the statute but also such additional functions as may be necessarily implied from those specifically mentioned.' Bloss, supra, p 233, citing 27 CJS District and Prosecuting Attor- neys, Sec. 10." Davis, supra, p 287.

Thus, Michigan law also favors the Imbler policy of protecting the prosecutor's independence of judgment from harassment due to the constant threat of potential litigation.

As the above-cited cases clearly indicate, the discretionary decision whether to charge and whether to continue a prosecution of a specific case lays at the very heart of the prosecutorial function. Commensurate with this duty is the need to gather sufficient information in order to render an informed decision on the paramount question of whether to initiate criminal proceedings. It is the epitome of the role of the prosecuting attorney.

In Imbler, this Court was fully cognizant of the role which effective preparation played in the process of determining whether to "initiate" a criminal prosecution (424 U.S. at 431 n. 33, 96 S.Ct. at 995 n. 33, 47 L.Ed.2d at 144 n. 33):

> We recognize that the duties of the prosecutor in his role as an

advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. ... These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. ... (emphasis added)

It was evident in Imbler that the question of drawing "...a proper line..." between a prosecutor's administrative functions and those which are "...intimately associated with the judicial phase of the criminal process..." was not properly before this Court. See e.g. Pembaur v. City of Cincinnati, 475 U.S. ___ n. 2, 106 S.Ct. 1292, 1295 n. 2, 89 L.Ed.2d 452, 459 n. 2 (1986). However, the instant case does present this Court with the appropriate opportunity to address this vital, and yet unresolved, issue.

A. INTERVIEWING WITNESSES PRIOR TO INITIATING PROSECUTION.

Subsequent to Imbler, various courts have isolated the conduct complained of, analyzed the functional nature of the questioned activity and thereafter attached the appropriate label to the role played by the prosecutor within the

context of the case. In interpreting the Imbler decision, it became readily apparent that not all prosecutorial duties that are performed outside the confines of a court of law would be entitled only to qualified good-faith immunity. Thus, in Cook v. Houston Post, 616 F.2d 791 (5th Cir. 1980) the court opined that in the customary course of preparing a criminal prosecution it is necessary that the prosecutor interview witnesses and conduct his own factual investigation. These activities are an integral part of the prosecutorial function and, as such, are cloaked with absolute immunity (616 F.2d at 793):

This Court, in interpreting Imbler, has extended prosecutorial immunity to a prosecutor's actions in initiating, investigating and pursuing a criminal prosecution. Henzel v. Gerstein, 608 F2d 654 (5th Cir. 1979); Connor v. Pickett, 552 F2d 585 (5th Cir. 1976). The

specific acts complained of here were clearly within the Imbler shelter.

> Collins would have been negligent in his duties as a prosecutor had he not interviewed witnesses before presenting their testimony to the Grand Jury. His duties as a prosecutor required him to obtain, examine and interpret documents. As Judge Cowan correctly pointed out in his Order Granting Summary Judgment,
>
> > "Not all of an advocate's work is done in the courtroom. For a lawyer to properly try a case, he must confer with witnesses, and conduct some of his own factual investigation."

Similar observations had been made by the Third Circuit Court of Appeals in

Forsyth v. Kleindienst, 599 F.2d 1203 (3rd Cir. 1979), aff'd in part, rev'd in part sub nom Mitchell v. Forsyth, 472 U.S. ___, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) wherein the court noted as follows (599 F.2d at 1215):

> We recognize that the decision of the Attorney General, or a prosecuting attorney, to initiate a prosecution is not made in a vacuum. On occasion, the securing of additional information may be necessary before an informed decision can be made. To grant a prosecuting attorney absolute immunity over his decision to initiate a prosecution while subjecting him to liability for securing the information necessary to make that decision would only foster uninformed decisionmaking and the potential for needless

> actions. We believe that the right to make the decision without being subject to suit must include some limited right to gather necessary infomation. At the same time, we are sensitive to the possibility that this narrow exception could be distorted to include all of a prosecutor's investigative activities. We hold only that to the extent that the securing of information is necessary to a prosecutor's decision to initiate a criminal prosecution, it is encompassed within the protected, quasi-judicial immunity afforded to the decision itself. (emphasis added)

In the instant matter, all events which were germane to the criminal prosecution occurred on the same day. In the early morning hours of March 14,

1980, an altercation took place between George Joseph, a younger brother of the plaintiffs, and the complaining witness, Hal Morrow. This resulted in charges of felonious assault and extortion being filed against George Joseph. A short time later, Morrow was contacted by the plaintiffs and offered a sum of money if he would agree to drop these criminal charges.

From mid- to late morning on March 14, 1980, local police officers contacted the Oakland County Prosecutor's Office and requested assistance regarding the filing of possible criminal charges against the plaintiffs. By mid-afternoon, following Chief Assistant Prosecutor Thompson's interview of Morrow, a criminal complaint, arrest warrant and search warrant (to secure the receipt which Morrow had signed for the money which he received from the plaintiffs) were sought

before a state judge. The criminal complaint and both warrants were issued at the same hearing on the afternoon of March 14th and the search and arrest warrants were executed that afternoon.

It is abundantly clear from the present record that all of the prosecutor's activities, including his interview of the complaining witness, occurred in such a close temporal proximity that they were inextricably intertwined with the initiation of the criminal prosecution. Nevertheless, the majority of the Court below opined that remand was necessary "...to determine the nature and intent of the interview..." because "...there are allegations which could support a finding that Thompson acted in an investigative capacity during the interview..." (795 F.2d at 555).

Judge Nelson, in his dissenting

opinion, noted that the joint pretrial statement filed in District Court which characterized the plaintiffs' claims failed to make any reference to the interrogation of Hal Morrow. Judge Nelson added that, even if the issue had properly been preserved, the Morrow interview must be considered to be an integral part of the process of "initiating a prosecution" (795 F.2d at 562):

> "Clearly," as this court says in Part III C of its opinion, "decisions of when and how to prosecute are not made in a vacuum, so that in some cases the directing of police to secure further evidence may be necessary to and part of a decision to prosecute." It seems to me that the interrogation of Morrow, which dealt with facts critical to the

> prosecution of Lawrence and Frank Joseph and which took place on the very day the prosecution was initiated, was so clearly an integral part of the initiation of the prosecution that further factfinding would be pointless.

In a remarkably similar case involving a prosecuting attorney's liability for his "pre-charging" activities, the court in Schieb v. Humane Soc. of Huron Valley, 582 F.Supp. 717 (E.D.Mich.1984) held that state prosecutors were absolutely immune from civil rights suit for allegedly conspiring with police to entrap defendants during an investigation of suspected dogfighting. Therein, a county prosecuting attorney consulted with various law enforcement officials during the course of an investigation to uncover suspected violations of state law regarding dogfighting. The court found

that any pre-charging activities of the prosecutor were covered by the umbrella of absolute immunity since "...the obvious purpose of which is to inform the decision of the prosecutor whether or not to institute criminal proceedings..." (582 F.Supp. at 723). In order to clarify its decision, the District Court conducted the following analysis of the standard which it believed was appropriate (582 F.Supp. at 724):

> The Imbler Court focused its attention upon the prosecutor's decision to bring charges or not, and the conduct of a criminal prosecution once the charges were brought. Several decisions from the Courts of Appeal have recognized that a rigid distinction between advocacy and investigative functions was impractical and somewhat disingenuous, inasmuch as

EDITOR'S NOTE

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those functions are inextricably intertwined in the mind of the prosecutor. This Court believes that a further dissection of investigative activities between "pre-decision to charge" and "post-decision to charge", or "pre-selection of a target" and "post-selection of a target" is equally unwise. Fair and effective enforcement of the criminal laws is furthered by encouraging the prosecutor to explore, as fully as possible, all available sources of information prior to making a determination about whether to proceed to prosecution, to refrain from prosecution, or to dismiss a prosecution improvidently brought. The rules that govern the prosecutor's conduct, including the rules that govern his/her amen-

ability to a civil suit for damages, should be structured in such a way as to encourage the fullest exploration of relevant facts prior to making the decision to charge.

* * *

Any activity which occurs prior to the bringing of criminal charges, the obvious purpose of which is to inform the decision of whether or not to charge, would be protected. Thus, such activities as interviewing witnesses, consulting with police, or even as here, taking part in the formulation of an operation to ascertain the identity of persons inclined to violate the criminal laws have as their obvious purpose the accumulation of information concerning the potential criminal liability of

> suspects. The prosecutor must be free to engage in this kind of activity if he is to faithfully discharge his duty to vigorously enforce the criminal laws. (emphasis added)

Courts of Appeal in the Ninth and Tenth Circuits have similarly adopted the reasoning espoused by the court in Schieb; namely, that absolute immunity applies to the activities of a prosecuting attorney in the necessary investigation and preparation which must precede the decision to initiate a criminal prosecution. Olagues v. Russoniello, 770 F.2d 791 (9th Cir. 1985); Demery v. Kupperman, 735 F.2d 1139 (9th Cir. 1984); Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675 (9th Cir. 1984); Freeman on Behalf of the Sanctuary v. Hittle, 708 F.2d 442 (9th Cir. 1983); Atkins v. Lanning, 556

F.2d 485 (10th Cir. 1977). See also: Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980); Chicopee Lions Club v. District Attorney, 396 Mass. 244, 485 N.E.2d 673 (1985).

It is respectfully urged that such an analysis of the pre-charging activities of a prosecuting attorney be adopted by this Court. Such an approach will provide prosecuting attorneys with the protection necessary to prosecute to the fullest possible degree violations of the criminal law without fear of being subjected to potential liability based upon claimed civil rights violations.

B. ISSUANCE OF SEARCH WARRANTS.

Immediately after having determined that the prosecuting attorneys in the instant matter were entitled to absolute immunity for obtaining the issuance of criminal complaints and arrest warrants

against the Josephs (795 F.2d at 555-556), the Court held that a further factual inquiry was required to determine whether the actions of the prosecutors in seeking the issuance of a search warrant at the same time they filed the complaint and requested arrest warrants was merely an investigative function and, thus, not entitled to the shield of absolute immunity (795 F.2d at 556).

As aptly pointed out by Judge Nelson in his dissenting opinion (795 F.2d at 561):

> If any prosecutor was peripherally involved in obtaining the search warrant, I see no basis for distinguishing his conduct from the obtaining of the arrest warrants, which Part III B of the court's opinion holds is protected, without

further inquiry, by absolute immunity.

Judge Nelson also noted that counsel for the Josephs conceded, before the District Court, that actions taken merely to request the issuance of arrest and search warrants could fall within the prosecutor's "quasi-judicial" function which is protected by absolute immunity (795 F.2d at 561).

As with the prosecutor's interview of the complaining witness in this case, the limited factual investigation which must precede any decision to initiate a criminal prosecution must include the ability to gather essential evidence. Frequently, the seizure of critical physical evidence can only be accomplished through the use of a search warrant. Without it, the initiation of many criminal prosecutions would not be

possible. Essential to this process is the need for full cooperation between prosecutors and law enforcement officers. In order to avoid the seizure of evidence which may later be declared to be inadmissible due to improper actions taken by the police and to protect the rights of the public from such potentially improper conduct, prosecuting attorneys must be permitted to advise and counsel law enforcement personnel in the gathering of such evidence which will be utilized in the decision of whether to initiate a criminal prosecution. The propriety of this approach was recognized by the court in Schieb v. Humane Soc. of Huron Valley, supra. Therein, District Judge Joiner succinctly stated the rationale to support this approach as follows (582 F.Supp. at 723):

> ... (T)he giving of legal advice to police and other persons engaged

in the business of law enforcement is a task which the prosecutor is best situated to undertake, given his legal training and his formal ties with the police. Because there is a strong public policy encourageing the prosecutor to give such legal advice to police engaged in new and potentially problematic methods of law enforcement, without the fear that such counseling will later impose upon the prosecutor the hardship of being hailed into court as a defendant in a civil case, the Court concludes that such activity is the kind which should be protected by absolute immunity, in furtherance of the policies underlying Imbler and its progeny.

Throughout Michigan, law enforcement agencies rely upon prosecutors for aid and guidance in assembling a case for

prosecution. Indeed, they are encouraged to do so in order to avoid the possibility that the methods which they employ in gathering evidence do not run afoul of constitutional and legal principles. For example, in Wayne County, all local police agencies are directed to obtain the approval of the Prosecutor's Office before seeking the issuance of a search warrant from a court of competent jurisdiction. Such a procedure helps ensure the validity of the warrant by screening out those requests which are not founded upon probable cause and by correcting those requests which may contain a fatal flaw. It cannot be seriously argued that such an approach does not serve a vital function in effective law enforcement. However, should the decision in the instant matter be permitted to stand, prosecuting attorneys would be ill-advised to continue such a practice

and thereby face the very real threat of being "...hailed into court as a defendant in a civil case".

It would appear that federal prosecutors enjoy a greater degree of immunity under similar circumstances than state prosecutors do. In upholding a federal prosecutor's claim of immunity, the court in Krohn v. United States, 742 F.2d 24 (1st Cir. 1984) noted as follows (742 F.2d at 30):

> Federal prosecutors must investigate as well as prosecute, as evidenced by their express authority to request search warrants. See F.R.Crim.P. 41(a); cf. Imbler v. Pachtman, 424 U.S. 409, 430-431, 96 S.Ct. 984, 994-95, 47 L.Ed.2d 128 (1976). They must enjoy broad discretion as to the means employed. FBI agents, of

> course, are given explicit authority to investigate and seize. See 18 U.S.C. 3052, 3107. Here Brown (the federal prosecutor) and the other officials clearly were acting in their investigative capacity.

It is respectfully urged that state prosecuting attorneys must also be accorded absolute immunity when counseling law enforcement agencies and when seeking the issuance of search warrants. To permit the decision of the Court of Appeals to stand will needlessly expose prosecutors to the continuing threat of civil litigation and will "...foster uninformed decisionmaking and the potential for needless actions." Forsyth v. Kleindienst, 599 F.2d at 1215.

## SUMMARY OF ARGUMENT

In Imbler v. Pachtman, this Court held only that a prosecutor is immune from a civil suit for damages under 42 U.S.C. 1983 in "initiating a prosecution and in presenting the State's case". "Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them ." 424 U.S. at 431 n. 33, 96 S.Ct. at 995 n. 33, 47 L.Ed.2d at 144 n. 33. In the ten years since Imbler, this Court has not addressed the issue which is presented in the instant petition; namely, to what

extent is a prosecutor immune from suit for actions which are taken prior to the filing of criminal charges?

The ability to conduct interviews of witnesses prior to decision of whether to initiate a criminal prosecution and the opportunity to assist police agencies in the drafting and preparation of search warrants prior to the initiation of criminal proceedings must not be hampered by the cloud of potential civil liability. Such activities are an integral part of the process of "initiating a prosecution". To deny such protection will only inhibit the fair and effective enforcement of the criminal laws and "foster uninformed decision-making".

## CONCLUSION

WHEREFORE, The Prosecuting Attorneys Association of Michigan, as Amicus Curiae, requests this Honorable Court to grant the petition for a writ of certiorari filed by the Petitioners in this matter.

Respectfully submitted,

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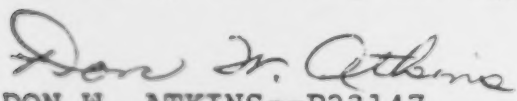

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